88-1288

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD PETTY, Petitioner

vs

State of Ohio, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIFTH APPELLATE JUDICIAL DISTRICT OF OHIO, RICHLAND COUNTY

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and

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106 pp

QUESTION PRESENTED

IN A HIGHLY PUBLICIZED INVESTIGATION, RESULTING IN AN INDICTMENT AGAINST THE ELECTED SHERIFF ALLEGING CRIMINAL CONDUCT BASED ON POLITICAL MOTIVATION, DOES THE FAIR TRIAL/FREE PRESS BALANCING TEST REQUIRE THE TRIAL COURT TO PERMIT INQUIRY INTO THE NATURE AND SUBSTANCE OF THE INTENSE POLITICAL PUBLICITY SURROUNDING THE ALLEGATIONS OF THE INDICTMENT, TO WHICH ALL FIFTY-SEVEN (57) PROSPECTIVE JURORS ACKNOWLEDGE EXPOSURE?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD PETTY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIFTH APPELLATE JUDICIAL DISTRICT OF OHIO, RICHLAND COUNTY

The petitioner, Richard Petty, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the Fifth Appellate Judicial District of Ohio, Richland County, Ohio. Said judgment was not accepted for review by the Ohio Supreme Court pursuant to an order

entered on November 23, 1988.

OPINIONS BELOW

The Ohio Supreme Court overruled petitioner's motion for leave to appeal and claimed appeal as of right from the judgment and decision of the Court of Appeals of the Fifth Appellate Judicial District of Ohio, Richland County. A copy of the Court's entry appears in the Appendix to the Petition at A1. The opinion of the Fifth District Court of Appeals of Ohio is unreported but is attached in the Appendix at A2.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on November 23, 1989, and this petition was timely filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

The Petitioner, Richard Petty, was the duly elected Sheriff of Richland County, Ohio.

Petitioner was indicted March 7, 1987 on three (3) counts of Tampering with Evidence (Sec. 2921.12 Ohio Revised Code), and three (3) counts of Obstructing Justice (Sec. 2921.32 Ohio Revised Code). Petitioner was arraigned and released on a $4,500.00

personal recognizance bond.

The assigned Judge requested the appointment of a Jurist from a different county. Judge Reece, from Summit County (Akron, Ohio), was appointed at 1:18 P.M., April 13, 1987. An Affidavit of Prejudice was filed against said Judge by defense counsel on April 14, 1987. The Chief Justice of the Ohio Supreme Court ordered a stay in the proceedings pending the outcome of the hearing on the Affidvit of Prejudice.

Eventually the stay was dissolved and the case was remanded to Judge Reece for trial. The Court overruled various pre-trial motions in June of 1987 and the case commenced to trial on June 29, 1987.

A guilty verdict was returned on two (2) counts of Obstructing Justice and two (2) counts of Tampering with Evidence. The jury acquitted the Petitioner of one (1) count of Obstructing Justice and one (1) count of

Tampering with Evidence.

Sentencing was scheduled for July 31, 1987. Petitioner filed for a new trial and a motion for Judgment of Acquittal. Said motions were overruled and the Petitioner was sentenced to a fixed term of years in prison or surrender his badge and be placed on probation, in addition to a $2,000.00 fine.

In a split decision (2-1), the Fifth District Court of Appeals of Richland County, Ohio affirmed the decision of the trial court.

Petitioner appealed to the Ohio Supreme Court. On November 23, 1988 the Supreme Court of Ohio denied the appeal on the ground that no substantial constitutional question existed. Ohio Supreme Court Entry, Appendix at A1.

Within the above procedural history of the case, the following recitation of facts is appropriate.

The record in the instant case reflects massive pretrial publicity. This case involved the prosecution of the chief law enforcement officer of a medium-sized county in which that prosecution was subsequently determined to be the county's news story of the year 1987. The original potential panel of jurors consisted of 57 persons (TR-29), every single one of whom had had some media exposure to the case prior to their appearance for jury duty. (TR-29-32).

Petitioner's counsel moved (TR-15) for individual voir dire of the prospective jurors on the publicity issue, which motion was tentatively overruled by the trial court. (TR-16). After voir dire had substantially progressed with only general questions to the entire panel on such issue by the court (TR-26-50), and absolutely no

questions on the subject from the prosecution, Petitioner renewed his motion for individual publicity voir dire (TR-172). When that motion was overruled (TR-174), Petitioner requested that questions on the subject be permitted to the entire panel (TR-174). The court also denied this request (TR-174).

HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

As noted in the Statement of the Case, the Petitioner, through counsel, repeatedly requested individual voir dire for the purpose of determining specific information the individual juror received from the publicity. Each request was denied by the trial court on the record.

At that point, counsel moved to at least be able to seek specific publicity information from the panel as a whole. This

request was likewise denied on the record.

This issue was presented to the Fifth Judicial District Court of Appeals, Richland County, Ohio, for direct review.

That Court addressed the federal claims on the merits. The opinion is attached in its entirety, Appendix A2. At page 17 of that opinion, the Court ruled:

> In an effort to determine whether the trial court erred to the prejudice of the appellant, we examine the entire voir dire transcript with a view to determining whether the same complies with the mandates of the U.S. Constitution, Fifth, Sixth, Fourteenth Amendments, and Article I, Sec. 9, 10, 16 of the Ohio Constitution, in the context of Cooper v. State (1866), 16 Ohio St. 328, and cases impacting the issue since.

The Appellate Court concluded at p.19 that the "conduct of the voir dire ... did not violate any constitutional rights of the appellant."

The issue of a federal right to a fair trial through a meaningful voir dire was likewise presented to the Ohio Supreme Court. In Petitioner's brief seeking review, the claim was presented as follows:

PROPOSITION OF LAW NO. 2

IN A CRIMINAL TRIAL INVOLVING OVERWHELMING PRETRIAL PUBLICITY, AND IN WHICH EVERY PROSPECTIVE JUROR IN A POOL OF FIFTY-SEVEN HAS GARNERED SOME KNOWLEDGE OF THE CASE PRIOR TO BEING SUMMONED, IT IS ERROR NOT TO PERMIT INDIVIDUAL SEQUESTERED VOIR DIRE ON THE ISSUE OF SUCH PUBLICITY; AND, IN THE ABSENCE OF SUCH INDIVIDUAL SEQUESTERED VOIR DIRE, MEANINGFUL INQUIRY INTO SUCH PUBLICITY ISSUES MUST BE PERMITTED IN GENERAL VOIR DIRE.

AUTHORITIES CITED IN SUPPORT OF PROPOSITION OF LAW NO. 2

Fifth Amendment, United States Constitution
Sixth Amendment, United States Constitution
Fourteenth Amendment, United States Constitution
Article I, Section 9, Ohio Constitution
Article I, Section 10, Ohio Constitution
Article I, Section 16, Ohio Constitution

Cooper v. State, 16 Ohio St. 328 (1966)
State v. Fairbanks, 32 Ohio St. 2d 34 (1972)
State v. Lewis, 33 Ohio St. 2d 125 (1970)
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Frazier v. State, 23 Ohio St. 551 (1873)
Fry v. State, 43 Ohio App. 154 (1932)
Ohio Revised Code Section 2945.27
Lesnick v. State, 48 Ohio App. 517 (1934)
State v. Swanson, 16 Ohio App. 3d 375 (1984)
State v. Jones, 21 Ohio App. 3d 331 (1984)
Townsend v. State, 17 C.C. (N.S.) 380 (1980)
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Palmer v. State, 42 Ohio St. 596 (1885)
State v. Vails, 22 Ohio St. 2d 103 (1970)
Ohio Revised Code Section 2945.25(C)
State v. Bayless, 48 Ohio St. 2d 73 (1976)
State v. Laskey, 13 Ohio App. 2d 91
Fifth Amendment, United States Constitution
Sixth Amendment, United States Constitution
Fourteenth Amendment, United States Constitution
Article One, Ohio Constitution
Article Sixteen, Ohio Constitution

Furthermore, in Petitioner's brief to the Ohio Supreme Court, the Petitioner argued with respect to the denial of a meaningful voir dire on pretrial publicity that:

> In a case such as this, such prohibition was unconscionable, and deprived Appellant of his due process right to a fair trial by an impartial jury as guaranteed him under the Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution, and under Article I, Sections 9, 10 and 16 of the Ohio Constitution.

The Ohio Supreme Court declined review in an order filed November 23, 1988.

REASONS FOR GRANTING THE WRIT

Many of the more widely-known cases in which this Court has addressed issues which must balance the competition between the interests of the First Amendment freedom of press, and the Fifth, Sixth and Fourteenth Amendment fair trial rights of a criminal defendant have involved activity which

transpired on the record. Such cases as Shephard v. Maxwell, 384 U.S. 333 (1965) and Ervin v. Dowd, 366 U.S. 717 (1961) were cases in which the trial judge should have recognized from events occurring before his eyes that the coverage of the cases by a free press prevented the defendants from being accorded due process in disposition of their cases.

In the present case, Petitioner, the duly elected Sheriff of a medium-sized Ohio county, was charged in a criminal proceeding that had all of the steam and intrigue to lure the press: allegations of the intentional cover-up of an arson-for-hire confession from the daughter of his campaign manager, who was herself an employee of the state auditor, and who was being, at the very hour that the entire matter "broke", prepared to be appointed and sworn in as the finance director for the city of Mansfield.

Although Petitioner does not charge that the in-court activities of the press prevented a fair trial, the record demonstrates that the handling of that media attention (or, more appropriately, the lack thereof) did just that.

As noted, all 57 members of the prospective jury panel had had some degree of exposure to Petitioner's prosecution and related events prior to trial. Thus, a very ticklish situation was presented to the trial court.

> To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Gannett Co. v. DePasquale, 443 U.S. 368 (1979), at 378.

Obviously, the steps which must be taken by the trial court depend in some part upon the individual circumstances of the case. However, after the selection of a jury pool from the roles of registered voters, the

only significant opportunity that a trial court has to interact with potential trial jurors is during the voir dire process. In some cases the degree to which the trial court permits inquiry on particular issues is of much less importance than others, and Petitioner does not here contend that unlimited voir dire, or individual voir dire, or voir dire by counsel (as opposed to the court) raises substantial constitutional questions in the abstract. However, the state of the law and the commentary clearly indicate that, in cases involving substantial pretrial publicity, different standards must apply to a determination of whether the jury selection process accommodates due process. See ABA Standards for Criminal Justice, Standard 8-3.5 (1981).

The lower federal courts have long recognized the constitutional magnitude of this issue. In addition, and most important

here, it has been recognized that a general, boilerplate treatment of the issue by the trial court cannot suffice. See United States v. Davis, 583 F. 2d 190 (C.A.5 1978).

The trial judge's rambling and general treatment of the publicity issue here was precisely the type found lacking in United States v. Davis, supra, and other cases.

> (W)hen the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, more than abbreviated questioning...is necessary. United States v. Hawkins, 658 F.2d 279 (C.A.5 1981), at 285.

In this case, the prejudicial nature of the publicity is apparent from the exhibits made a part of the record by Petitioner, and the inquiry was not an issue with just one juror, or with a small group of jurors, but with every single prospective juror. The rulings by the trial court which prevented Petitioner from having the very first bit of

information about the substance of the case knowledge brought by the panel into the courtroom, violated minimum due process standards as set forth by this Court.

Citing Ervin v. Dowd, supra, this Court has held that:

> (a) jurors's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Murphy v. Florida, 421 U.S. 794 (1975), at 800.

The voir dire process is the only vehicle reasonably capable of putting a defendant in a position to meet this burden. United States v. Rucker, 557 F.2d 1046 (1977). See also ABA Standard 8-3.5, (1981).

Sometimes, in fact, prejudice is presumed where the influence of the news media, "either in the community at large or in the courtroom itself, (has) pervaded the proceedings." Murphy v. Florida, supra, at 799. (Emphasis added.) Petitioner would

respectfully submit that the exhibited publicity, coupled with the fact that every single one of the 57 prospective jurors were touched by it, is sufficient under Murphy to presume prejudice.

Since the issue here is one of due process, fair trial and right to an unbiased jury, it is also of utmost importance that, to determine the effect of massive publicity, the reviewing court must turn "to any indications in the totality of the circumstances that petitioner's trial was not fundamentally fair." Murphy v. Florida, supra, at 799. Petitioner's trial itself was conducted under circumstances which led the dissenting judge in a 2-1 state appeals court decision (the only review on the merits that Petitioner's case has had) to vote for reversal not only upon the due process publicity issue addressed here, but also upon the ground that the treatment of

the Petitioner and his counsel by the trial judge deprived Petitioner of his right to a fair trial.[1] The events of the trial were so emotionally charged that the immediate post-trial news story was of a juror who indicated that she had direct auditory communication with God during the trial and deliberation processes.[2]

Furthermore, the record will reflect that the entire theory of the government's case was that the Petitioner's actions were politically motivated, and both pretrial and trial proceedings

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[1] In his state court appeal, Petitioner appended a list of transcript citations numbering no fewer than 54 in a six-day trial, which were illustrative of the unfavorable comments and conduct of the trial court upon the case and conduct of Petitioner and his counsel. The record also reflects that all of this occurred after Petitioner had filed a pre-trial Affidavit of Prejudice against the visiting trial judge, who was sitting by assignment after the voluntary recusal of all local judges.

[2] As reflected by the Motion for New Trial which is part of the record.

had plot twists involving senatorial aspirations, political favors, power struggles between and among the county sheriff's office, the Mansfield Police Department, the Richland County Prosecutor's Office, and the Ohio Bureau of Criminal Identification and Investigation, drug trafficking at a nearby state prison, and fire departments and arson investigators, and all this case activity was conducted in an atmosphere where Petitioner's campaign manager's daughter was arrested on the arson charge, which Petitioner was accused of concealing, hours before her appointment to a governmental post from which the previous office-holder had resigned after being charged with a criminal offense, and after a much publicized search warrant execution and safe-cracking in the Sheriff's private office at headquarters. This search was based upon an affidavit demonstrating a lack

of probable cause,in that it claimed only that documents demonstrated to be in existence 28 months earlier were not discovered in one other location.[3]

In such an atmosphere, not only must the basic fairness of the proceedings be questioned, the composition of the jury generally, as well as the composition of the frame of mind of each juror is of obvious importance. As Justice Marshall wrote in his dissent from the denial of certiorari in Davis v. Florida, 473 U.S. 913 (1985):

> The question...is not whether the jury actually was biased against petitioner,

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[3] This raises the issue of governmental intrusion into the workplace of elected government officials. Although Petitioner accepts the exclusionary rule as a curb on improper state activity, he has, at this time, instructed counsel not to seek the protection of the exclusionary rule in this petition. If this Court, however, wishes to review the matter in a ripe controversy under its plenary powers, see Appendix A57.

> but whether he was unconstitutionally deprived of the opportunity to uncover such bias and to exercise his for-cause challenges to root it out. The right to an impartial jury encompasses the right to take reasonable steps designed to insure that the jury is impartial. (Citations omitted.)...Moreover, the informed exercise of jury challenges is an essential element in insuring jury impartiality.
> 473 U.S. at 914.

See also United States v. Rucker, supra.

Since it is a defendant's burden to show lack of impartiality in a given juror before that juror is subject to excuse, some latitude must be provided to probe that area.[4] Chandler v. Florida, 449 U.S. 560 (1981).

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[4] Ohio law gives a criminal defendant or his counsel the absolute right to inquire on voir dire, even if the judge conducts his own examination. Rule 24, Ohio Rules of Criminal Procedure.

In the case at bar, the trial court took the following steps on the jury/publicity issue:

(1) It rambled at some considerable length about the fact that no juror should be affected by what he or she had heard about the case, because to be influenced by such information or knowledge would deprive both sides of a fair trial.

(2) It ascertained that all 57 prospective jurors had been exposed to media coverage of the case.

(3) It discussed the sources (not the contents) of information with the jurors, who indicated that they could be fair notwithstanding what they had seen, read or heard. This was in response to such questions from the bench as "You think you

could be fair and objective in this case?"

(4) It excused eight jurors who, in response to the boilerplate questioning, indicated that they questioned their ability to remain fair and impartial.

(5) It then inexplicably ceased to question on the publicity issue and moved on to other general areas of inquiry, e.g., credibility of police officers.

(6) It then, after a recess during defense voir dire, overruled a renewed defense motion for individual voir dire on the publicity issue, and then proceeded to overrule a defense motion to inquire into the issue on general voir dire of the entire panel.

The effect of this series of events was the

Petitioner never was accorded the opportunity to find out the substance and nature of the knowledge that even a single one of the 57 prospective jurors brought with them to the courtroom. The entire record of this case demonstrates that this omission was part of an overall intent on the part of the trial court to get the trial started and finished in the shortest possible time without regard to the fairness or lack thereof which accompanied the trial.

As earlier indicated, Murphy v. Florida, supra, and Chandler v. Florida, supra, both place upon a defendant the burden of showing partiality before a juror is excluded. However, if any meaningful inquiry into knowledge and attitudes is prevented, that burden is an impossible one. In Murphy v. Florida, supra, the opportunity to inquire was given, but insufficient prejudice was uncovered. In Petitioner's case, the degree

of prejudice was never possible to determine.

At the outset of this argument, Petitioner conceded differences between his case and those of Shepard v. Maxwell and Ervin v. Dowd. In those cases, the prejudicial effect of the clash between the First Amendment and a defendant's fair trial rights were, or should have been, apparent to the trial court by simple use of the powers of observation. In the present case, the balancing of the interests of the press and this defendant never had the opportunity to occur, and that is in itself a violation of due process.

In a concurring three-justice opinion, Mr. Justice Brennan has most concisely spoken to and, Petitioner would submit, resolved the issue before this Court in this case:

> (t)he trial judge should employ the voir dire to probe fully into the effect of

> publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data... Particularly in cases of extreme publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976), Brennan, J., concurring.

Obviously Petitioner was completely prevented from such inquiry in a case where all reasonable precautions would be taken by any reasonable court to assure that the proceedings were not tainted.

In these times when public officials and their activities are under increasing scrutiny from the public through the media, it is ever more important to assure that public officials who are criminally charged maintain the right to the same fair dispositions of their cases as other

less-publicized defendants automatically receive in the absence of pretrial publicity. The only ingredient needed to achieve the free press/fair trial balance in this case would have been a meaningful inquiry on voir dire into the exposure to the case that all prospective jurors had. Instead, the trial court completely and utterly failed to exercise the affirmative constitutional duty imposed by this Court in Gannett Co. v. DePasquale, supra, to minimize the effects of the prejudicial pretrial publicity. As a result, Petitioner, a 30-year law enforcement professional with a spotless record, was stripped of his liberty, his office and his dignity without being afforded the fundamental fairness required for all those individual rights he was charged with protecting during that 30-year career. Such lack of fairness must result in a reversal

of Petitioner's convictions, and Petitioner respectfully implores this Court to therefore grant his Petition for the issuance of a writ of certiorari to the Court of Appeals of the Fifth Appellate Judicial District of Ohio, Richland County.

CONCLUSION

This Court has been vigilant in balancing the free press/fair trial dichotomy. This is a compelling case of national consequence in setting forth specific fair trial rights in light of an aggressive free press.

Respectfully submitted,

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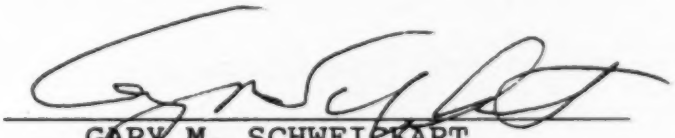
CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on respondent State of Ohio by forwarding a copy to the office of its counsel, Rocky Coss, 146-1/2 East Main Street, Hillsboro, Ohio 45133, by United States Mail this 20th day of January, 1989. I further certify that all parties required to be served have been served.



GARY M. SCHWEICKART
Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD PETTY,

Petitioner,

v.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIFTH APPELLATE JUDICIAL DISTRICT OF OHIO, RICHLAND COUNTY

APPENDIX

THE SUREME COURT OF OHIO

COLUMBUS

1988 TERM

To wit: November 23, 1988

State of Ohio, :
Appellee : Case No. 88-1706

v. : E N T R Y

Richard Petty :
Appellant :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Richland County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitution question exists therein.

COSTS:

Motion Fee, $20.00, paid by Gary W. [sic] Schweickart.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. John R. Milligan, P.J.
Plaintiff-Appellee	:	Hon. John R. Hoffman, J.
	:	Hon. Earle E. Wise, J.
vs.	:	
	:	
RICHARD PETTY,	:	
	:	
Defendant-Appellant:		O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. 87-CR-116

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 26, 1988

APPEARANCES:

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Richland County, Case No. CA-2522

MILLIGAN, P.J.

TAMPERING, R.C. 2921.12 - OBSTRUCTING JUSTICE, R.C. 2921.32 -ATMOSPHERE OF TRIAL, FAIR TRIAL, DUE PROCESS - VOIR DIRE LIMITATION - SUFFICIENCY OF EVIDENCE - JURY INSTRUCTIONS - SPECIAL PROSECUTOR - SUPPRESSION OF SEARCH WARRANT - JURY COMPETENCE - REMOVAL OF SHERIFF - INSPECTION OF WITNESS NOTES

On March 7, 1987, the Sheriff of Richland County was indicted on three counts of tampering with evidence, R.C. 2921.12, and three counts of obstructing justice, R.C. 2921.32.

Following a jury trial in Richland County, presided over by a visiting judge, the sheriff was convicted of two counts of obstructing justice and two counts of tampering. Following the overruling of motions for new trial and acquittal, the sheriff was sentenced to a fixed term of years and ordered to pay a fine. The prison

sentence was suspended upon conditions including, inter alia, voluntary resignation as Richland County Sheriff.

He appeals, assigning fourteen errors:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN THE CONDUCT OF THE CASE IN THAT ITS TREATMENT OF APPELLANT, HIS COUNSEL, HIS WITNESSES AND ITS GENERAL DEMEANOR DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN PROHIBITING MEANINGFUL VOIR DIRE ON THE ISSUE OF PRETRIAL PUBLICITY.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT PERMITTED THE TESTIMONY OF LOUISE BUSH OVER OBJECTION, DENIED A MOTION TO STRIKE, AND DENIED A LIMITING INSTRUCTION.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF ALL OF THE EVIDENCE.

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AFTER DELIVERY OF THE JURY'S VERDICT.

SEVENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ENTERING JUDGMENT OF CONVICTION, INASMUCH AS SUCH CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

EIGHTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ENTERING JUDGMENT OF CONVICTION, INASMUCH AS SUCH CONVICTIONS WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE.

NINTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTIONS NUMBERED TWO, THREE, FOUR, SIX AND SEVEN.

TENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN NOT DISMISSING THE INDICTMENT DUE TO THE FACT THAT A SPECIAL PROSECUTOR WAS APPOINTED BY THE COMMON PLEAS COURT CONTRARY TO THE

SEPARATION OF POWERS DOCTRINE CONTAINED IN THE OHIO AND FEDERAL CONSTITUTIONS.

ELEVENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN NOT SUPPRESSING THE EVIDENCE OBTAINED BY A SEARCH WARRANT BASED ON AVAILABLE FACTS THAT WHOLLY FAIL TO MEET ANY PROBABLE CAUSE STANDARD.

TWELFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT REFUSED TO GRANT A NEW TRIAL BASED ON A JUROR REACHING A VERDICT WHILE POSSESSING SPECIAL POWERS TO COMMUNICATE DIRECTLY WITH GOD; DID COMMUNICATE WITH GOD DURING THE TAKING OF EVIDENCE; WROTE GOD'S COMMENTS IN A JOURNAL THAT WAS ORDERED CONFISCATED BY THE COURT; AND REFUSED TO ALLOW HER THEORY OF INNOCENCE TO BE CONSIDERED SINCE IT CAME FROM GOD RATHER THAN THE EVIDENCE.

THIRTEENTH ASSIGNMENT OF ERROR

THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO SITTING EN BANC HAS NO AUTHORITY TO REMOVE THE SHERIFF FROM OFFICE OR TO RESTRAIN HIM FROM CARRYING OUT HIS DUTIES.

FOURTEENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN REFUSING TO ALLOW AN IN CAMERA INSPECTION OF THE VOLUMES OF NOTES AND MEMORANDA PREPARED BY VARIOUS WITNESSES AND SUBMITTED TO THE SPECIAL PROSECUTOR.

The counts of the indictment upon which appellant was convicted may be summarized as follows:

First Count: That defendant, knowing an official proceeding or investigation was in progress regarding an arson fire at 211-213 Bowman Street, did, on January 29, 1984, "alter, conceal or remove one or more record, document or thing with purpose to impair its value or availability as evidence in such proceeding or investigation, in derogation of R.C. 2921.12(A)(1).

Second Count: Over the period October 22, 1984, to February 12, 1987, did, "with purpose to hinder the discovery, apprehension, prosecution, conviction or punishment of another, Debra Berges Fenton and/or Ronald Fitch, did conceal physical evidence of ... arson," in derogation of R.C. 2921.32(A)(4).

Fourth Count: Over the period of

October 22, 1984, to February 12, 1987, did, "with purpose to hinder the discovery, apprehension, prosecution, conviction or punishment of another, Debra Berges Fenton and/or Ronald Fitch," for the crime of falsification and/or grand theft, conceal physical evidence of either falsification or grand theft, in derogation of R.C. 2921.32(A)(4).

Fifth Count: During the period October 22, 1984, to February 12, 1987, knowing that an official proceeding or investigation was in progress regarding complicity to breaking or entering and/or receiving stolen property, did alter, conceal or remove one or more record, document or thing with purpose to impair its value or availability as evidence, in derogation of R.C. 292 .12(A)(1).

Richard Petty was first elected Sheriff of Richland County in 1980 and was

re-elected in 1984. The Debra Berges named in the indictments is the daughter of Louise Bush, a close personal friend of the sheriff and his wife and a long-time political associate. In addition to social and political alliances, Louise Bush was appointed by the sheriff to conduct land appraisals.

Debra Berges was employed by the State Auditor and performed local government audits. She was also active in the same political party, and first met appellant when he was a candidate for sheriff.

In 1984, Berges, the owner of several apartment buildings and houses in Mansfield, found herself in severe financial trouble and was suffering a serious drinking problem. She formed an alliance with Ronald Fitch and Ronald Holbrook, and in January, 1984, suggested that she would benefit financially if one of her rental properties

burned. T. 234-303. On January 29, 1984, Fitch burned down one of Berges' properties on Bowman Street. Berges was out of town at the time. The Mansfield Fire Department Arson Investigator, Charles Hooks, determined the fire to be an arson, but had no reason to suspect Berges of any involvement.

Berges received $11,900 from her fire insurance carrier and paid Fitch $1,000 for setting the fire in March, 1984.

Berges also became aware that Fitch, Holbrook and one Doug Rush were involved in numerous burglaries. She received and harbored stolen property at her home. T. 247.

Berges was hospitalized for one month, beginning May 19, 1984, for alcoholism treatment, following which she severed her ties with Fitch and Rush, and returned to her State Auditor position during which time

she audited appellant's commissary account. T. 248-50. She participated in 1984 in the appellant's campaign, along with her mother.

Fitch, Holbrook and Rush were arrested October 10, 1984, on charges including theft and breaking and entering. Berges was not implicated.

In August or September, 1984, Fire Inspector Hooks developed information causing him to suspect Berges may have been involved in the Bowman Stret fire, this after an accidental fire occurred in another of her buildings. He contacted Fitch who did not divulge the circumstances of the Bowman arson. In September or early October, 1984, Inspector Hooks spoke with appellant, requesting assistance, he being aware of appellant's close relationship with Berges' mother. T. 369.

On October 22, 1984, Berges was working in the Richland County Courthouse;

appellant invited her to his office and talked to her, appellant's wife taking notes. State exhibit 7. At that time, Berges admitted to appellant her possession of stolen property and her payment to Fitch for setting the Bowman Street fire.

On October 27, 1984, appellant, his wife, and a court reporter went to the Berges home. Numerous items of stolen property were recovered, and Berges gave a voluntary statement which was stenographically recorded and later transcribed. State's exhibit 6. Later that same day, appellant confronted Louise Bush and advised her of the statement, claiming also that Fitch had implicated Louise Bush. She denied involvement and offered to confront Fitch, a confrontation that never transpired. T. 478. Fitch, Holbrook, and Bush were contacted by appellant, but none gave any statements implicating Berges in the Bowman Street arson.

Thereupon, appellant placed in the evidence room the recovered stolen items and partially completed a receipt. State's exhibit 10. He filed the receipt in the Fitch, Holbrook, Rush file and completed a general offense report. State's exhibit 13.

Appellant constructed a file folder, State's exhibit 4, into which he placed the statements and other exhibits.

The evidence supports the conclusion that the file folder and its contents were not divulged to any other person over the period of October 1984 to February 12, 1987. Appellant did not inform Inspector Hooks of the confession and, in his testimony, denied hearing anything about the fire. T. 374.

Fitch, Holbrook and Rush were eventually convicted of numerous charges and imprisoned.

Two years after the statements were

procured from Berges, in October 1986, Hooks received a communication from a prison inmate implicating Fitch in the Bowman Street arson. Two inmates were later interviewed by the fire department investigation team and the Mansfield Police Department, special investigative unit, was called into the investigation.

On February 9, 1987, Fitch confessed his role in the arson and agreed to cooperate. T. 393. The Mansfield Police Department taped phone calls between Fitch and Berges and her husband, Rick Fenton. T. 320.

At that time, appellant was in Florida attending a seminar. Upon learning from Berges about the call from Fitch, Mrs. Bush contacted appellant in Florida on February 11, 1987, at which time he advised her to tell her daughter, Berges, to drop out of consideration for appointment as Mansfield

City Finance Director, a position being filled at the Democrat executive committee that night. T. 388. That same day, February 11, Berges was arrested on charges of arson and grand theft. Upon being advised of her prior statement to appellant, officers attempted to locate the statement in the Richland County Sheriff's Department. No officers were aware of the statement, and it could not be located.

On February 12, 1987, a search warrant was executed and, after appellant was contacted on the telephone, his desk was searched and the file folder containing exhibits, including the incriminating statement in 1984, was recovered. After the office search, Louise Bush called appellant, and he responded that "he understood that Debbie told everyting." T. 507.

The gist of the Sheriff's defense is that his conduct was an exercise of

official, investigatory authority, and that he was exercising his discretion in the manner in which he dealt with the exhibits, including the statement. He claims that he has been subjected to a political prosecution and suggests that if the conviction is allowed to stand, it augers ill for the entire law enforcement process. He suggests that any law enforcement person who allows an investigation which involves political corruption within his jurisdiction to proceed slowly and deliberately is in jeopardy. That kind of pressure would encourage rash investigation of low quality. He states:

> Absent a showing of criminal purpose, the executive branch of government must only be held accountable for discretionary judgment at the voting booth, not in the criminal courts of our justice system. To permit otherwise would be to invite political trials for political reasons on discretionary matters.
>
> Appellant's brief at 2.

We agree with this principle and review the numerous assignments of error within the context of legal, not political, boundaries.

The evidence presented by the defendant was, inter alia, that there was no agreement between him and either Debra or Louise Bush; that Fitch, Holbrook, and Rush were already incarcerated for burglary; that he suspected some connection between the Bowman arson and another fire on Adams Street in which a young child died; that the Adams Street fire involved another property owned by Debra Berges and tenanted by Fitch, at which Holbrook was babysitting at the time of the fatal fire. T. 991. Further, appellant was aware that the statute of limitations for prosecution of the arson ran until 1990 and that, as to the fire and death, there was no statute of limitations; that he was waiting for the last of the incarcerated offenders to be released from prison in an effort to

solve the Adams Street fire as well; that when asked by telephone while in Florida, he was not sure where the file was, i.e., it could have been in two places in his office or in the general offense file for burglaries, T. 971-1073; that he passed a polygraph examination, T. 5-156.

In oral argument, appellant focused upon three central issues:

> 1. The entire atmosphere in which the trial was conducted denied appellant his fair trial, due process rights.
>
> 2. Restrictions on voir dire examination denied due process rights.
>
> 3. The evidence was insufficient to sustain the verdict.

We accept the invitation of appellant to deal with the numerous assignments of error individually and collectively.

We overrule the assignments of error and affirm the judgment.

I - TRIAL JUDGE MISCONDUCT/BIAS

The first assignment of error invites us to examine the transcript to determine therefrom whether the conduct of the trial judge as relates to the appellant, his attorney, and witnesses for the defendant, deprived appellant of a fair trial. In support of his claim, appellant directs us to 45 instances in the transcript.

It is clear that we cannot, and should not, examine the issue of fairness and due process without examining the entire record. Compare State v. Perotti (1960), 170 Ohio St. 363.

Appellant additionally inserts into the mix the demonstrated fact that an affidavit of prejudice had been filed against the trial court at the beginning of the case, which affidavit was overruled. (The issue involved here was a refusal of a request for a continuance and an effort to delay the proceedings.)

Appellant thus argues that the trial court developed a fixed attitude of opposition to defense counsel, which manifested itself in comments and observation of the trial judge in the presence of the jury so as to communicate a disdain for the appellant's theory of the case. The judge breached the duty of maintaining an attitude of fairness and impartiality to the prejudice of appellant. Adams v. Yellow Cab Corp. (1981), 427 N.E.2d 398; State v. Pokini (1976), 548 P.2d 1397.

Appellee counters by arguing that the trial court had no such fixed opposition; that the judge was even-handed and simply exercising his duty to prevent and suppress misconduct of counsel; and that the trial court was baited by counsel in an effort to establish a record for potential appeal in the event of conviction (a trial tactic).

As it relates to comments of the trial

court beyond those traditionally assigned to the trial judge within his supervisory responsibility, we find instruction from State, ex rel. Wise v. Chand (1970), 21 Ohio St. 2d 113.

> In a trial before a jury, the Court's participation by questioning or comment must be scrupulously limited, lest the Court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness.
>
> State, ex rel Wise, supra.

Upon an examination of the entire record, with specific references to those items specifically complained of, we find no support for the claim that the trial court, by its rulings or its interjections, tainted the procedure so as to deny the defendant-appellant a fair trial. Although hindsight suggests several comments of the court might better not have been made, we find no prejudice, singularly or collectively.

The cryptic comments of expectation by the trial judge in chambers, pre-trial, are addressed to both counsel and not inappropriate. T. 13.

None of the interjections of the court during voir dire (T. 161, 166, 179) are inappropriate.

T. 404. The comment, "you put 1,500 people together, every politician in the county will be there. If he or she isn't, they're a fool," was made in response to questioning about who was present at an FOP function.

T. 470. The comment about "that's all we've talking about" does not prejudice the appellant.

T. 563. The court instructed counsel not to testify and to allow the witness to testify, notwithstanding cross-examination.

T. 567. The court instructed counsel not to deal with questions of rumors,

discussion, feelings, and sensitivity and denied to counsel a bench conference.

T. 598. At a bench conference, the trial court laments his failure to conduct in camera inspection as it has led the parties astray in examination and cross-examination. As counsel was making a discovery argument, the court stated, "you arrive at that by a most convoluted mind."

T. 740. The court instructed counsel that he was reaching the point of absurdity and warned, "any more shenanigans like that, counselor, you're going to be reprimanded for it."

T. 781. The court advised counsel he did not want a philosophical debate.

T. 790. The court instructed counsel not to "debate" with the court.

T. 800. The court instructed counsel not to argue with the witness.

T. 805. The court instructed counsel

not to characterize the testimony, just ask questions.

T. 889. The court instructed counsel to move along with the questioning.

T. 922. When one counsel asked for a brief moment in the hall, the court said he was "getting rid of a lawyer. (There is no indication the comment was not made in good humor.)

T. 957. The court instructed a witness not to "guess".

T. 961. During direct examination of the defendant's wife, counsel asked to approach the bench; the court said "just conclude, if you can," and when counsel said he had about another 25 minutes, the court said, "stay with it then, I can wear you out." To which counsel responded, "you wore me out Judge," and concluded his questioning.

T. 995. Counsel was instructed not to testify.

T. 1064. Counsel was instructed not to lead the witness.

Sentencing hearing, T. 169. The court, reflecting upon the question of "is any shame left in this country from the president to a federal judge to a secretary to a sheriff," addressed the image of the office and, in so doing, said:

> ...So the thing that troubles me is I don't know if the sheriff is aware of, even if he's convinced himself of his innocence or even worse if he's let you convince him of his innocence and, therefore, he's not concerned about the image of his offce [sic], but has he stopped to think about what the other 87 sheriffs must think of the office at this point in time? Has he thought about what the other law enforcement officers in the state must think about the matter? Sometimes it's not what the truth is, it's what is presented.

Sentencing hearing, T. 170.

In the case sub judice, unlike State v. Kay (1976), 12 Ohio App.2d 38, the trial court did not make repeated comments on the

evidence suggesting that witnesses were or were not cooperative or truthful. He did not, overtly or inferentially, communicate any guilt bias to the jury.

The rhetoric of the Supreme Court in State v. Perotti (1960), 170 Ohio St. 363 is peculiarly appropriate as applied to this case:

> Taken out of their context, some of the trial judge's observations seem unnecessary and of questionable propriety. However, a careful study of the entire record discloses the combination of circumstances under which the judge felt impelled to admonish the defendants' counsel. This is illustrated by the counsel's annoying tendency to indulge in extended arguments in the presence of the jury whenever the judge overruled his objections to questions asked of defense witnesses on cross-examination. It is an understatement to observe that the resulting repartee was hardly complimentary to either the judge or counsel. In one instance the judge said, "Now, Mr. Wise, you may make all the objections you want at recess, but you are not to interrupt the cross-examination, please." That the judge was showing his umbrage at the interrupting argument and not at the objections is disclosed by a closely

related statement, "Let's get this straight, Mr. Wise, I don't want you to interfere when questions are asked unless there is an objection."

State v. Perotti, supra.

Neither the treatment of appellant, his counsel, his witnesses, nor his general demeanor deprived appellant of a fair trial.

The first assignment of error is overruled.

II - VOIR DIRE

The gist of the second assignment of error is that as a result of massive pretrial publicity, interrogation of prospective jurors in depth by counsel was a necessary prerequisite to making an intelligent decision as to whether to request a change of venue or other appropriate remedy in the interest of fair trial.

At no time did appellant move for a change of venue.

The original panel of 57 persons each acknowledged that they had had some media exposure to the case prior to their appearance to jury duty. T. 29-32.

Counsel originally moved for individual voir dire examination, a motion that was tentatively overruled. Later in voir dire he renewed the motion and the same was overruled. T. 172. At that point, appellant requested that interrogation of the entire panel be permitted, and the request was overruled. T. 174.

In an effort to determine whether the trial court erred to the prejudice of the appellant, we examine the entire voir dire transcript with a view to determining whether the same complies with the mandates of the U. S. Constitution, Fifth, Sixth, Fourteenth Amendments, and Article I,

Sections 9, 10, 16 of the Ohio Constitution, in the context of Cooper v. State (1866), 16 Ohio St. 328, and cases impacting the issue since.

The trial court, in a narrative fashion, conducted extensive voir dire examination, including instructions. T. 18, et. seq.

Following prefatory comments, the trial court immediately discussed the issue of pretrial publicity with the jury. T. 26.

Dialogue between the court and prospective jurors begins at T. 29. At T. 32, the court articulates the legal problems inherent in pretrial publicity and identifies the reason for the inquiry into the effect thereof. T. 33.

> If what you have read has caused you to form some opinion, that you believe Mr. Petty as he sits here now is guilty because the newspaper says he was or because the radio said he was or because your neighbor has said he was, then you must tell us about that and you must not serve on this jury if you have that

viewpoint. It's very simple. You must not let what you have read or heard influence you in this case.

So, since all of you have had some exposure to some publicity, we're going to assume you have read about it or heard about it. So, what we're going to be talking about is whether that has affected you; what effect, if any, that's had on you. Has it caused you to form a viewpoint in this case. Does it cause you as you sit here this morning to have an opinion about this case. Does it cause you to have an opinion about Mr. Petty. Does it cause you to have an opinion about what the State must do or not do in this case.

Those are the matters we're going to be dealing with. Obviously, we can't excuse all of you if you've heard or read something about it, all of you had. The problem is not that you have, the problem is only if that has had some influence upon you. You're going to have to tell us that.
T. 23.

The first of the jurors specifically voir dired by the court said he might be affected. He was immediately excused for cause. T. 35. The process continued. The court interjected an additional cautionary instruction at T. 37.

In the process, eight more jurors were excused for cause for the reason of previously formed opinions due to publicity. T. 35, et seq.

The first interrogation by the prosecutor was directed to the issue of pretrial publicity. T.79.

Likewise, defense counsel began his voir dire by immediately addressing the issue of pretrial publicity. T. 140. He did question individual jurors. T. 141-44; 146-49. After further interrogation on other matters, appellant moved for individual voir dire. The court responded, after argument, that he was satisfied that there were some 50 jurors who could hear the case fairly and overruled the motion. Then appellant asked permission to inquire individually with the balance of the panel as "to each person's individual knowledge that they brought with them into this

courtroom concerning the case." T. 174. The motion was overruled.

At the conclusion of his voir dire, he inquired of the panel whether they could decide the case based upon the evidence rather than "theories that your Aunt Bessie might think or Uncle Fred or the News Journal..." T.179.

Appellant then passed the panel for cause. T.182. By the conclusion of voir dire, appellant had sufficient information and record upon which to request a change of venue. His failure to move for a change of venue was a legitimate trial tactic.

We conclude that the conduct of the voir dire was within the discretion of the trial court, Crim.R. 24, and did not violate any constitutional rights of the appellant. Compare State v. Gall (1980), 65 Ohio App.2d 57; U.S. v. Cassel (1982), 668 Fed.2d 969. For an extensive review of voir dire

procedure see "Trial Court Discretion in Conjucting [sic] Voir Dire Subjected to More Scrutiny: Cordiero v. U.S.," 33 Catholic U.

The second assignment of error is overruled.

III - TESTIMONY OF LOUISE BUSH

In his third assignment of error, appellant challenges the exercise of discretion by the trial court in allowing testimony of the mother of Debra Berges, i.e., Louise Bush, appellant's campaign manager, for the purpose of outlining his political career and aspirations. Appellant claims that the prosecution failed to connect in any way such testimony as relevant and permitted "wild speculation as to possible wrongful motives without any evidence whatsoever." Appellant's brief at 25.

We have examined the record from the perspective of Evid.R. 103(A), requiring that a "substantial right of the party is affected" and Evid.R. 401.

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> Evid.R. 401.

In this case, purpose to impair the value or availability of evidence is an element of tampering, R.C. 2921.12(A)(1), and purpose to hinder discovery, apprehension of an offender is an element of obstructing justice, R.C. 2921.32(A).

The trial court did not err in concluding that this evidence was relevant as relating to the motive, potentially of appellant in not acting on the information that was given him. Further, the witness testified that as early as October 27, 1984, appellant went to the witness and informed her of her daughter's confession and

possession of stolen property. T. 478-79.

The trial court did not err in the admission of the testimony of Louise Bush.

The third assignment of error is overruled.

IV - SUFFICIENCY OF EVIDENCE

Although appellee correctly argues that by presenting evidence after a motion for acquittal, appellant waives a claim of error based on the sufficiency of the State's evidence, Crim.R. 29, State v. Whitmeyer (1984), 20 Ohio App.3d 279, the policy considerations surrounding this assignment of error warrant discussion.

Appellant's argument that the trial court erred in overruling his motion for acquittal at the close of the State's case combines issues of circumstantial evidence law and public policy.

As indicated above, the culpable mental state for the commission of both crimes is "purpose".

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.
>
> R.C. 2901.22(A).

As is often the case in criminal prosecution, culpable mental state is proved by circumstantial evidence.

For purposes of a motion to acquit at the close of the State's case, the evidence is to be construed by the trial court most favorably to the State. See State v. Uhler(1979), 14 O.O.2d 158; State v. Innis (1981), 433 A.2d 646, cert. den'd. (1981), 456 U.S. 930.

At the close of the State's case, the evidence adequately supported the inference that appellant's purpose in concealing evidence of crime for over 27 months was to tamper and obstruct justice. Appellee correctly summarizes the evidence at this point in the trial:

> The evidence clearly showed that Appellant had obtained two statements from Debra Berges. (State's Exhibit 6 and 7). They were admissions of her guilt which also implicated Ronald Fitch. He talked to Louise Bush making a false accusation that she was implicated by Fitch. He secured all papers in

> his desk and concealed them for over 27 months. He told no law enforcement officers of his evidence. He had specifically been asked by Investigator Hooks to see if he could find out anything about the fire. He knew of Hooks' investigation, yet he did not tell Hooks anything to assist. In fact, he denied to Hook's [sic] learning anything at all. He did not report his findings to the insurance company. At the close of the State's case, there was no evidence whatsoever to suggest that Appellant had any reason to withhold the evidence, save two: to tamper with the evidence and to obstruct justice.
>
> Appellee's brief at 19, (emphasis theirs).

The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of the State's case.

In arriving at this conclusion, we have examined each of the cases relied upon by the appellant.

The circumstantial evidence upon which

the State's relief in State v. Goodin (1978), 56 Ohio St.2d 438, a case cited by appellant, in no way supports the theory that defendant knowingly presented a false record to the Hamilton County Grand Jury. The evidence showed only that defendant testified to the grand jury that he knew of another individual who kept a record of receipts of payment of monies. This testimony was insufficient to show any control over or knowledge of the contents of that record which was subsequently presented to the grand jury by someone else.

In the case at bar, the circumstantial evidence presented at trial was more than mere testimony indicating the existence of a file. Appellee presented a file admitted by appellant to be his own, composed by his own hand and kept in his own office for over 27 months. This evidence shows appellant had control over the file, had knowledge of the

contents of that file, and purposefully kept the file from the proper investigating officers. Goodin, supra, is distinguishable.

It is axiomatic that the essential elements of a crime may be proved by circumstantial evidence. The record reflects sufficient evidence to prove all the elements of the crimes of which appellant was convicted. See, e.g., State v. Hankerson (1982), 70 Ohio St. 2d 87.

Whether the circumstantial evidence also allows a reasonable theory of innocence is a question for the jury. We may reverse only where the evidence is insufficient as a matter of law. Unlike State v. Jacobozzi (1983), 6 Ohio St. 3d 59, the evidence, when taken together, is irreconcilable with a reasonable theory of innocence. See, e.g., State v. Franks (1979), 61 Ohio App. 2d 51.

Appellant superimposed upon the issues raised by proving purpose from circumstantial evidence the public policy issue created by the fact that the appellant is the sheriff, an elected, discretionary, chief law enforcement official. He argues that his task is to "preserve the public peace," R.C. 311.07, and suggests:

> ...It necessarily follows, then, that some independent judgment must be exercised by a Sheriff in the discharge of his duties. This is important as a policy consideration in any case involving the criminal prosecution of a Sheriff. To be able to impose criminal (as opposed to civil or electoral) liability as a sanction for errors in the exercise of judgment (if it can even be claimed that such occurred here) is to place such an official nearly, and unfairly, in a position where some feeling for the necessity of imposing a strict liability standard for judgment and behavior violates his due process and equal protection rights as an individual.
>
> Appellent's brief at 31.

We acknowledge both academically,

philosophically, and experientially, that the chief county law enforcement officer must, needs be, have substantial discretion in the investigation of allegations of, and enforcement of, criminal laws. Upon the facts and circumstances of this case, presented during the State's case, we are satisfied that a citizen jury is entitled to determine whether the exercise of discretion has yielded to an ulterior criminal purpose.

> Of course, there is involved a principle of moderation. If limits on the exercise of discretion are set too high, then there will be virtually arbitrary power. If the limits are set too low, there will be a strait-jacketing and mechanicalization of criminal law administration.
>
> Controls in Criminal Law Enforcement, The University of Chicago Law Review, Vol. 27, No. 3, Spring, 1960, 427-435, as reprinted in critical issues in law enforcement, Moore, Harry W. Jr., W. H. Anderson Co., Cincinnati, Ohio, 1972.

Upon the evidence in this case, we find no such abuse of discretion by the trial court in submitting the issue to the jury as to offend a broader, generic public interest purpose.

The fourth assignment of error is overruled.

V - SUFFICIENCY OF EVIDENCE

In this assignment of error, appellant incorporates the arguments from the fourth assignment of error and argues that, in toto, the circumstantial evidence of purpose yields itself to a reasonable hypothesis of innocence in such manner as to deny to the jury the right to hear the cause. Appellant claims that, as a matter of law, the hypothesis of innocence is sufficiently reasonable to require granting the motion for judgment of acquittal.

> Appellant testified that he had a theory of the possible connection between the Bowman Street fire and a subsequent fire in which a young child died (TR-992, et.seq.). The

parties connected to the two events were identical. The child who died was the son of another individual serving a sentence for a fire-connected death of yet another individual (TR-993, et.seq.). Three of the commonly identified individuals were sentenced to prison on unrelated burglary offenses (TR-997), and had not all yet been released (TR-997, et.seq.).

Appellant's brief at 34. Appellee counters:

> On the stand through Appellant's own testimony, the absurdity of this story was quite evident. For example, he admitted that he had no file on the Adams Street fire. (T-1022). He stated that after he became suspicious of a possible connection between the two fires, he took no action to see what might have happened to the child. (T-1023). In fact, after these charges were brought, he had Captain Shetler, his administrative assistant, contact the Fire Department to get the date of the Adams Street fire, because he did not know it. (T-1023). He stated he was waiting for Fitch to get out of prison, but was not aware of his release in July of 1986. (T-1030). He did not inform Washington Mutual of the fraud. (T-1030). He did not notify the State Auditor that Berges was an arsonist. (T-1032). He assigned no officer to do any follow up on Berges. (T-1034). He admitted he would have disciplined an officer who had completed a form such State's Exhibit 10. (T-1035).
>
> ...

> On State's Exhibit 13, item 100J was not checked. State's Exhibit 23, (S.O.P. No. 33) read at 100J: "check this box if it is anticipated that this report will prompt the opening of a case." Obviously, Appellant had no intention of ever filing charges against Berges.
>
> On redirect examination, Appellant admitted that he was not prepared to make the accusation that the Adams Street fire was an arson. (T-1058). On recross, Appellant admitted that he had not read any statement on the Adams Street fire, nor discussed it with Arson Investigator Hooks. (T-1065).

Appellee's brief at 21-22, (emphasis theirs).

Upon the authority of State v. Graven (1978), 54 Ohio St.2d 114, 374 N.E.2d 1370, and State v. Sheppard, (1956), 165 Ohio St.293, 135 N.E.2d 340, we conclude that the issue was properly submitted to the jury, subject to appropriate instructions.

We reach the same conclusion vis-a-vis the claim of appellant that his distrust of

the county prosecutor was the reason he did what he did.

We may reverse the judgment based on the jury verdict only "where the evidence is insufficient as a matter of law to enable [the] jury to exclude a reasonable hypothesis of innocence." State v. Graven, supra, syl. 4

The fifth assignment of error is overruled.

VI - INCONSISTENT VERDICT

Building upon the rationale of argument contained in his fourth and fifth assignments of error, appellant here claims that the trial court erred in failing to grant judgment of acquittal after the jury verdict for the reason that the jury acquitted the appellant of the sixth and final count of the indictment. It was that count that alleged the "only acts or omissions that purportedly related to

appellant's consciousness of not relating actual facts to other investigators." Appellant's brief at 36. He claims that finding the appellant not guilty of communicating false information to Captain Cairns and arson investigator Hooks renders the verdict on the other counts inconsistent.

We conclude that the several counts of the indictment were not interdependent; thus, inconsistency in a verdict does not arise from a finding of inconsistent responses to different counts. Compare State v. Adams (1978), 53 Ohio St. 2d 223.

It is quite logical, as suggested by appellee, that the jury could have believed Cairns' and Hooks' testimony about appellant's false statements, but concluded that rather than being calculated to tamper with or obstruct the cases of Berges and Fitch, they were intended to cover

appellant's own criminal acts.

The sixth assignment of error is overruled.

VII - WEIGHT OF EVIDENCE

For the reasons previously stated, and consistent with our limit of appellate review, 27 O.Jur.3d, Criminal Law, Sec. 1539, we find that the convictions are not contrary to the manifest weight of the evidence.

The seventh assignment of error is overruled.

VIII - SUFFICIENCY OF EVIDENCE

For the reasons enumerated at assignment of error seven, we overrule the eighth assignment of error.

IX

Appellee acknowledges that the

appellant did timely deliver to the trial court a request for seven special instructions, identified as Appendix "F" in his brief. The court failed to give requested instructions 2, 3, 4, 6 and 7. Although appellant does not separately brief the claimed error in the failure as to each request, we separately consider each.

Instruction request number 2. The court was requested to instruct the jury on the statute of limitations for arson being six years and that the prosecution would not be barred if it had been filed before January 29, 1990. The trial court did instruct the jury that the statute of limitations for a felony was six years. The appellant was entitled to no more and the court committed no error in this regard.

Instruction request number 3. The commission of the crime was a question of fact, not one of law, and U.S. v. Hoffa

(1966), 385 U.S. 293, and its holding, is inapposite.

Instruction request number 4. A requested instruction that the sheriff has "broad discretion on matters relating to criminal investigations" misses the point. The question is not one of the exercise of discretion, but whether the accused violated the criminal law.

Instruction request number 6. The request that the jury be instructed that they may not infer criminal intent or purpose from the mere fact that the Debra Berges statement was in the sheriff's office or from the mere passage of time is an incomplete statement of law. The trial court correctly instructed the jury as to their responsibilities with respect to sorting out the evidence and applying the evidence to the elements of each of the crimes.

Instruction request number 7. The request that the jury be instructed that only the prosecuting attorney could present charges to the grand jury is irrelevant.

The ninth assignment of error is overruled.

X - SPECIAL PROSECUTOR

Appellant claims that the trial court erred in not dismissing the indictment because the special prosecutor was appointed by the common pleas court, in violation of separation of powers doctrines contained in the Ohio and Federal Constitutions. He acknowledges that there is no authority in Ohio to support this conclusion and cites tangential authority on the issue of judicial and executive separation of power. (State, ex rel. Erman v. Gilman (1932), 44 Ohio App. 339 and Cincinnati v. Board of Education (1940), 63 Ohio App. 549.)

Appellant takes comfort from the emerging argument in the federal courts concerning the special prosecutor appointed by the court to investigate the "Iran-Contra scandal." In In re Sealed Case (C.A.D.C. 1988), 838 F.2d 476, the court found that the appointment of a special prosecutor by the district ccurt pursuant to the 1978 Ethics in Government Act violated the separation of powers clause of the U.S. Constitution.

We find that the appointment of a special prosecutor falls within the penumbra of R.C. 2941.63, authorizing the appointment of an attorney "to assist the prosecuting attorney in the trial of a case pending in such court."

Appellee observes that the appointment was made at the request of the Richland County Prosecutor who was in fact a witness in the case. For him to prosecute the case

would have been to violate Disciplinary Rule 5-102 of the Code of Professional Responsibility.

We find no constitutional or statutory impairment to the authority of the trial court to appoint the special prosecutor and overrule the tenth assignment of error.

XI - SUPPRESSION

The statements and other exhibits in the possession of the sheriff, in his office, were seized in response to a lawfully executed search warrant.

From the record, it is clear to us that the appellant consented to the search. By telephone he advised Captain Shetler where in the offices the file might be and instructed him to search for it. These instructions were carried out by the sheriff's subordinate who did, in fact, find the file and turn it over to the officers.

Although the State challenges the sheriff's standing to raise the issue as to his office within a courthouse, as an elected official, we do not reach that question.

The eleventh assignment of error is overruled.

XII - JUROR MISCONDUCT

Following the trial, one of the jurors, Judith Ann Foegen, executed as an affidavit a taperecorded interview with representatives of both the State and the defense in which she recounted a bizarre incident of having a conversation with God during the trial about the case.

In her lengthy statement, she explains that the experience was put out of her mind because it was not a "fact" in her deliberations with the jurors and was not communicated to any other jurors.

There is no evidence aliunde, and the citations presented by the appellant do not persuade us that the trial court erred in failing to find juror misconduct and in failing to grant a new trial.

The twelfth assignment of error is overruled.

XIII - REMOVAL AUTHORITY

The question of whether the Common Pleas Court of Richland County, en banc, had authority to remove the sheriff from office is not reviewable on a direct appeal of his conviction. Hughes v. Brown (Feb. 11, 1988), Franklin County Common Pleas No. 87CV-128087, unreported. It is simply not part of the criminal case. The thirteenth assignment of error is overruled.

XIV - IN CAMERA INSPECTION

The appellant demonstrates no error in the refusal of the trial court to allow in camera inspection of volumes of notes and

memoranda prepared by witnesses.

The trial court properly delineated statements from other documents not properly discoverable pursuant to Crim. R. 16.

The fourteenth assignment of error is overruled.

The fourteen assignments of error are overruled, and the judgment of the Richland County Common Pleas Court is affirmed.

Hoffman, J. concurs.

Wise, J. dissents.

/s/ JOHN R. MILLIGAN

/s/ JOHN R. HOFFMAN

JUDGES

JRM/la

Richland County, Case No. CA-2522,
Dissenting Opinion

WISE, J., DISSENTING

I respectfully disagree with the majority in their overruling of the first and second assignments of error. I would sustain the same, reverse the judgment, and remand this matter for a new trial.

/s/ EARL E. WISE

JUDGE EARL E. WISE

EEW/la

0721

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
	:	
-vs-	:	
	:	
RICHARD PETTY	:	
	:	
Defendant-Appellant	:	CASE NO. CA-2522

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio, is affirmed, and this cause is remanded to that court for execution of sentence.

/s/ JOHN R. MILLIGAN

/s/ JOHN R. HOFFMAN

JUDGES

SEARCH WARRANT

(FIRST PAGE OF 7 PAGES)

RICHLAND COUNTY COMMON PLEAS COURT

MANSFIELD, RICHLAND COUNTY, OHIO

NUMBER _____

THE STATE OF OHIO, RICHLAND COUNTY, SS:

TO: Chief Matthew M. Benick, Mansfield Police Department, and any and all members of his agency.

GREETINGS:

Whereas there has been filed with me an affidavit, of which the following is a copy:

AFFIDAVIT FOR SEARCH WARRANT

RICHLAND COUNTY COMMON PLEAS COURT

MANSFIELD, RICHLAND COUNTY, OHIO

AFFIDAVIT

STATE OF OHIO, MANSFIELD, RICHLAND COUNTY, SS:

Before me, the undersigned Judge of RICHLAND COUNTY COMMON PLEAS COURT personally appeared CAPT. WAYNE CAIRNS of the Mansfield Police Department, Mansfield, Richland County who being duly sworn according to the law, disposes and says that he believes and has good cause to believe, that in the place, that in the place [sic] described below:

The Office of Richland County Sheriff Richard H. Petty located at 55 East Second Street, Mansfield, Richland County, Ohio.

there is located the following property for which search authorization and seizure is sought, to wit:

Any and all records, files, statements, or papers relating to an interview between Sheriff Richard Petty and Debra Berges, that occurred on or about October, 1984.

Any and all records, files, or papers relating to the seizure of stolen property from 346 Davis Road, Mansfield, Richland County, Ohio, on or about October, 1984.

Substantially stated, the offense [sic] in relation thereto are:
O.R.C. 2921.12 Tampering with evidence

(A) No person, knowing that an official preceding [sic] or investigation is in

progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

O.R.C. 2921.32 Obstructing Justice

(A) No person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for a crime, or to assist another to benefit from the commission of a crime, shall do any of the following:

(4) Destroy or conceal physical evidence of the crime, or induct any person to withhold testimony or information or to elude legal process summoning him to testify or supply evidence.

Affiant states the factual basis for such beliefs are:

1. Upon his knowledge as an investigating officer.
2. On January 29th, 1984, a residential fire at 211-213 Bowman Street, Mansfield, Richland County, Ohio, was determined to be Arson by investigators of the Mansfield Fire Department Arson Unit.
3. On February 9th, 1987, Ronald E. Fitch was arrested for Arson. Mr. Fitch related that he had reliable information that Sheriff Richard Petty had knowledge that Debra Berges, a.k.a. Debra Fenton, hired Mr. Fitch to set fire to the residence located at 211-213 Bowman Street. In addition, Sheriff Petty, had collected numerous pieces of stolen property from the residence of Debra Fenton at

346 Davis Road which had been taken in burglaries in Richland and Ashland Counties.

4. On February 11th, 1987, Debra Fenton also known as Debra Berges, was taken into custody for Arson and Grand Theft as a result of the fire on January 29th, 1984, at the residence located at 211-213 Bowman Street.

5. On February 11th, 1987, a statement was taken from Debra Fenton in which she confirmed that she in fact gave a voluntary statement to Sheriff Richard Petty on or about October, 1984. Present during the statement were Deputy Dorothy Petty, and Silvia Coder, a secretary for the Richland County Sheriff's Department.

6. During the statement of Debra Fenton on February 11th, 1987, to members of the Mansfield Police Department,

Special Investigative Unit, she related that secretary Silvia Coder recorded her statement given to Sheriff Petty during October, 1984. The statement was a complete confession by Debra Fenton regarding her hiring Ron Fitch to set fire to 211-213 Bowman Street. In addition, the statement implicated Debra Fenton as an aider and abettor to possession of stolen property and possible conspirator to burglaries which occurred in 1984.

7. On February 11th, 1987, Silvia Coder was interviewed by members of the Mansfield Police Department and confirmed that she had in fact accompanied Sheriff Petty and Deputy Petty to the residence of Debra Fenton at 346 Davis Road during 1984, for the purpose of recording a statement given

by Debra Fenton. Ms. Coder related that the statement contained information on burglaries and stolen property, and in addition numerous articles of suspected stolen property were removed from the residence of Debra Fenton by Sheriff Richard Petty following the statement.

8. Mrs. Coder stated she transcribed the statement and shredded her original notes, which is standard policy. The statement was then given to Sheriff Petty for filing in the invesigative case file or in his Personal Office.

9. On February 11th, 1987, the investigative case file in which the statement would have been placed was checked personally by Jim Stierhoff, Investigator for the Richland County Prosecutor's Office, and the statement and records relating to the seizure of

evidence on or about October, 1984 could not be located.

10. Mrs. Silvia Coder Administrative Secretary to Sheriff Richard Petty related that the filing system in the office of the Sheriff is maintained solely by Sheriff Petty, and at times Deputy Dorothy Petty. [sic] and is not accessible by any other person in the Sheriff's Department.

11. On February 12th, 1987, the affiant and the investigators exhausted all available resources in an attempt to locate the statement and any other papers relating to the October 1984 statement and seizure of property referred to herein with the exception of a search of the office of Sheriff Richard Petty, which cannot be accessed by any other member of the Richland County Sheriff's Department.

12. A Nighttime search warrant is requested as the property sought is necessary to continue the criminal investigation and any unnecessary delay would hamper the successful prosecution of any and all suspects.

13. On February 11, 1987, Attorney Robert Whitney verified that he had been retained in October 1984 to represent Debra Berges and that at that time she related to him that she had given a statement to Sheriff Petty about the arson and burglaries.

/s/ Wayne L. Cairns
SIGNATURE OF AFFIANT

Sworn to and subscribed
before me this 12 day of
February, 1987.

/s/ James D. Henson
JUDGE, COMMON PLEAS COURT

MANSFIELD, RICHLAND COUNTY, OHIO

These are therefore to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the (A) NIGHTTIME into the above described (B)

The Office of Richland County Sheriff Richard H. Petty located at 55 East Second Street, Mansfield, Richland County, Ohio.

in the County aforesaid, and there diligently search, within three (3) days from the issuance of this warrant, for the following property: (C)

Any and all records, files, statements, or papers relating to an interview between Sheriff Richard Petty and Debra Berges that occurred on or about October, 1984. Any

and all records, files, or papers relating to the seizure of stolen property from 346 Davis Road, Mansfield, Richland County, Ohio, on or about October, 1984.

(A) Designate "DAYTIME" (0700 hours to 2000 hours), unless probable cause in affidavit justifies "NIGHTTIME". See Criminal Rule 41 (F)

(B) Name or describe the person to be searched and/or "with particularity" describe the place and/or vehicle to be searched. See Criminal Rule 41 (C)

(C) Identify and describe the proeprty to be searched for and seized. See Criminal Rule 41 (B)

and to further command you to keep all property seized, and each part thereof, for

use as evidence, and to make return promptly, accompanied by a written inventory of any property taken, to this undersigned Judge of the RICHLAND COUNTY COMMON PLEAS COURT.

Given under my hand this 12th day of February, 1987 at 1:37 o'clock, A.M.

/s/ James D. Henson
JUDGE, RICHLAND COUNTY COMMON PLEAS COURT

LAST OF SEVEN PAGES